

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WARREN E. ARMSTEAD,)	CASE NO.: C07-0025-JCC
)	
Petitioner,)	
)	
v.)	REPORT AND RECOMMENDATION
)	
DOUG WADDINGTON,)	
)	
Respondent.)	
_____)	

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Warren E. Armstead proceeds *pro se* in this 28 U.S.C. § 2254 action. (Dkts. 21-24.) Respondent submitted an answer, arguing that petitioner's claims should be dismissed with prejudice as time-barred. (Dkt. 29.) Petitioner argued in response that the statute of limitations should be equitably tolled. (Dkt. 34.) Following a request from the Court (Dkt. 36), respondent addressed petitioner's equitable tolling argument in a reply (Dkt. 37). Now, having reviewed the record in its entirety, including the state court record, the Court recommends that the petition be dismissed with prejudice.

Petitioner challenges his January 2004 convictions on multiple counts, including possession of cocaine, heroin, and stolen property, and identity theft and forgery. (Dkt. 31, Exs. 1-4.) The

01 Snohomish County Superior Court clerk filed petitioner's sentences on February 13, 2004. (*Id.*)
02 Petitioner's earned early release date is in February of 2008. (*Id.*, Ex. 5.)

03 Acting *pro se*, petitioner filed a personal restraint petition on December 30, 2004. (*Id.*,
04 Ex. 6.) The Washington Court of Appeals dismissed the petition on December 5, 2005. *Id.*, Ex.
05 7.) Petitioner failed to file a petition for review.

06 Again acting *pro se*, petitioner filed a second personal restraint petition in the Washington
07 Supreme Court on September 8, 2006. (*Id.*, Ex. 8.) The Supreme Court dismissed this petition
08 as time-barred on December 1, 2006. (*Id.*, Ex. 9.) Petitioner filed a motion to modify, which the
09 Supreme Court denied on January 30, 2007. (*Id.*, Ex. 10.)

10 Petitioner raises four grounds for relief in this habeas action:

- 11 1. Illegal search. Arrested and convicted as a result of this search.
- 12 2. Illegal search of my home. Searched without a warrant or probable cause
13 from the Washington State Department of Corrections.
- 14 3. No probable cause to search my home months after a crime was committed.
- 15 4. Arrested twice within 48 hours for a crime I was freed from.
- 16 5. Ineffective assistance of counsel.

17 (Dkts. 22-24.) Respondent argues that these claims are time-barred. For the reasons described
18 below, the Court agrees with respondent.

19 Section 2254 contains a one-year statute of limitations:

20 (1) A 1-year period of limitation shall apply to an application for a writ of habeas
21 corpus by a person in custody pursuant to the judgment of a State court. The
limitation period shall run from the latest of-

22 (A) the date on which the judgment became final by the conclusion of direct

01 review or the expiration of the time for seeking such review;

02

03 28 U.S.C. § 2244(d)(1). Under § 2244(d)(1)(A), a judgment becomes final ninety (90) days after
04 entry of the highest state court's decision on direct review, which marks the expiration of the
05 period for filing a petition for a writ of certiorari. *See Bowen v. Roe*, 188 F.3d 1157, 1159 (9th
06 Cir. 1999). The limitation period is tolled for the "time during which a properly filed application
07 for State post-conviction or other collateral review with respect to the pertinent judgment or claim
08 is pending[.]" 28 U.S.C. § 2244(d)(2). State collateral review is considered "pending" and the
09 limitation period tolled from the time the initial application for collateral review is filed until that
10 application is disposed of by the highest state court; it "is not tolled from the time a final decision
11 is issued on direct state appeal and the time the first state collateral challenge is filed because there
12 is no case 'pending' during that interval." *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999).

13 In this case, because petitioner did not file a direct appeal, his conviction became final on
14 or about March 13, 2004, thirty days after the Snohomish County Superior Court clerk filed his
15 sentences on February 13, 2004. *See* 28 U.S.C. § 2244(d)(1) and Washington Rule of Appellate
16 Procedure (Wash. RAP) 5.2(a). His one-year statute of limitations under 28 U.S.C. § 2244(d)(1)
17 began to run the following day, on March 14, 2004. *See Corjasso v. Ayers*, 278 F.3d 874, 877 (9th
18 Cir. 2002). Petitioner's statute of limitations ran for approximately nine and a half months, until
19 petitioner filed his first personal restraint petition on December 30, 2004. As noted above,
20 petitioner did not petition for review in the Washington Supreme Court. As such, the statute of
21 limitations began to run on or about January 5, 2006, thirty days after the December 5, 2005
22 dismissal of this petition by the Washington Court of Appeals. *See* Wash. RAP 13.4(a). The

01 statute of limitations then ran for eight more months, when petitioner filed his second personal
02 restraint petition on September 8, 2006. Because petitioner's statute of limitations ran for some
03 seventeen and a half months before he filed his federal habeas petition in this Court, his petition
04 is time-barred by 28 U.S.C. § 2244(d)(1).

05 The only recognized exception to the statute of limitations is equitable tolling. *See*
06 *Calderon v. United States Dist. Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled*
07 *in part on other grounds by Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530, 540 (9th
08 Cir. 1998) (en banc). However, "[e]quitable tolling will not be available in most cases, as
09 extensions of time will only be granted if 'extraordinary circumstances' beyond a prisoner's
10 control make it impossible to file a petition on time." *Id.* (quoting *Alvarez-Machain v. United*
11 *States*, 107 F.3d 696, 701 (9th Cir. 1997)). "When external forces, rather than a petitioner's lack
12 of diligence, account for the failure to file a timely claim, equitable tolling of the statute of
13 limitations may be appropriate." *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999) (applying
14 equitable tolling where delay on the part of prison officials was beyond petitioner's control and
15 petitioner demonstrated due diligence in submitting habeas petition). As stated by the Ninth
16 Circuit, in each of the cases in which equitable tolling has been applied, "the misconduct [of either
17 state officials or petitioner's counsel] has actually prevented the prisoner from preparing or filing
18 a timely petition." *Shannon v. Newland*, 410 F.3d 1083, 1090 (9th Cir. 2005), *cert. denied*, 126
19 S. Ct. 1333 (2006). Petitioner bears the burden of proving his entitlement to the equitable tolling
20 of his statute of limitations. *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003).

21 Petitioner asserted the following equitable tolling arguments in his amended habeas
22 petition:

01 I was not aware of the statute of limitations. I was not informed by my attorney. I
02 filed my petition ten days before the expiration year. I had not received the finality
03 letter from the Court of Appeals and still did not have my discovery from the state or
04 from my attorney, Christine Costello. I ended up getting the discovery from the
05 federal attorney on my federal case. I filed motions and sent letters to the Court of
06 Appeals. I got no response on my federal case. I filed motions and sent letters to the
07 Court of Appeals. I got no response until June of 2006. I have copies of letters
08 showing that I attempted many times to make contact. I also filed motions to the
09 Supreme Court trying to get them to direct the Court of Appeals to contact me about
10 the decision they had made.

07 (Dkt. 22 at 14-15.) In his response to respondent's answer, petitioner indicated he was transferred
08 from Snohomish County Jail to the Federal Detention Center after filing his first personal restraint
09 petition and did not hear of its dismissal until informed by his federal trial counsel in March 2006.

10 (Dkt. 34 at 1-3.) Among other documents, he attached letters to the Washington Court of
11 Appeals and Washington Supreme Court in which he indicated he was only belatedly informed of
12 the dismissal of his personal restraint petition, referenced prior letters purportedly sent to the state
13 courts, and sought the re-opening of his petition. (*Id.*, Ex. 1.) He also attached responsive
14 documents from the state courts, including letters advising him that he would have to move to
15 recall the certificate of finality and seek an extension to file a motion for discretionary review.
16 (*Id.*)

17 However, as argued by respondent, the Court finds no basis for equitably tolling the statute
18 of limitations in this case. Petitioner's lack of knowledge or familiarity with the legal process does
19 not justify equitable tolling. *See, e.g., Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000)
20 ("[I]t is well established that 'ignorance of the law, even for an incarcerated pro se petitioner,
21 generally does not excuse prompt filing.'" (quoting *Fisher v. Johnson*, 174 F.3d 710, 714 (5th
22 Cir. 1999)); *Hughes v. Idaho State Bd. of Corrections*, 800 F.2d 905, 908-09 (9th Cir. 1986) (pro

01 se status, release of inmate assisting with post-conviction proceeding, and illiteracy did not justify
02 equitable tolling). Nor would ordinary negligence of an attorney suffice to justify equitable tolling.
03 *Spitsyn*, 345 F.3d at 800.¹ In any event, although petitioner refers to his trial counsel in state and
04 federal criminal proceedings, neither individual represented petitioner in his state collateral
05 proceedings. Finally, it appears that petitioner did not receive notice of the dismissal of his first
06 personal restraint petition because he failed to inform the Washington Court of Appeals of his
07 correct address following his transfer to federal detention. (*See* Dkt. 34, Ex. 1 at 5 (state court
08 docket indicating December 2005 order dismissing personal restraint petition and February 2006
09 certificate of finality were returned as “Released”, and that, in response to a letter from petitioner
10 received on March 6, 2006, both were re-sent to him via his “current address according to
11 letter”).) Petitioner provides no evidence to the contrary. (*See id.*, Ex. 1.) As such, any delay
12 stemmed from petitioner’s own lack of diligence, rather than extraordinary circumstances beyond
13 his control.

14 Because petitioner fails to identify any extraordinary circumstances beyond his control that
15 prevented him from filing a timely habeas petition, his petition should be denied and this action

17 ¹ The Ninth Circuit has “acknowledged that where an attorney’s misconduct is sufficiently
18 egregious, it may constitute an ‘extraordinary circumstance’ warranting equitable tolling of [the]
19 statute of limitations.” *Spitsyn*, 345 F.3d at 800. In *Spitsyn*, the Ninth Circuit found an attorney’s
20 conduct sufficiently deficient so as to distinguish it from merely negligent performance where an
21 attorney “was hired nearly a full year in advance of the deadline, . . . completely failed to prepare
22 and file a petition[,]” and retained the file for more than two months beyond the deadline, despite
repeated efforts at contact by the petitioner and his mother, including a request for the case file.
Id. at 801. In contrast, the Ninth Circuit has, for example, held that an attorney’s miscalculation
of the limitations period for filing a habeas petition does not constitute “extraordinary
circumstances” sufficient to warrant equitable tolling. *See Miranda v. Castro*, 292 F.3d 1063,
1066-68 (9th Cir. 2002); *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001).

01 dismissed with prejudice. No evidentiary hearing is required as the record conclusively shows that
02 petitioner is not entitled to relief. A proposed order accompanies this Report and
03 Recommendation.

04 DATED this 9th day of July, 2007.

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07 Mary Alice Theiler
08 United States Magistrate Judge
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